UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

JENKINS SECURITY CONSULTANTS, INC.,[1]

Employer

and

Case 5-RC-16602

UNITED SECURITY & POLICE OFFICERS OF AMERICA,[2]

Petitioner

and

INTERNATIONAL TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, OPEIU LOCAL 4873, AFL-CIO[3]

Intervenor

DECISION AND ORDER

The Employer, Jenkins Security Consultants, Inc., a District of Columbia corporation with an office and place of business in Washington, D.C., is engaged in the business of providing security guard services to industry and governmental agencies including at the Domestic Nuclear Detection Office facility in Washington, D.C., the only location involved in this proceeding. During the past twelve months, a representative period, the Employer, in conducting its business operations described above, performed services valued in excess of $50,000 in states other than the District of Columbia.

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[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.
[3] The name of the Intervenor appears as amended at the hearing.

The Intervenor, International Technical and Professional Employees Union, OPEIU Local 4873, AFL-CIO, represents guards at the Domestic Nuclear Detection Office facility. The Intervenor is a labor organization that admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards.

The Petitioner, United Security & Police Officers of America, filed a petition to represent all full-time and regular part-time security officers employed by the Employer at the Domestic Nuclear Detection Office facility in Washington, D.C. The unit excludes all clerical employees, professional employees, managerial employees, and supervisors as defined by the Act.

This case presents a single issue: whether a collective-bargaining agreement exists between the Employer and the Intervenor, which operates as a contract bar to the representation petition filed by the Petitioner.

The Employer, Petitioner, and Intervenor all appeared at a hearing before an officer of the Board, and all three parties waived the filing of post-hearing briefs. I have carefully considered the evidence and arguments presented by the parties at the hearing. As discussed below, I conclude that the petition should be dismissed because it is barred by the current contract between the Employer and the Intervenor.

1. STATEMENT OF FACTS

Sometime on or about August of 2007, the Intervenor executed a collective-bargaining agreement with USEC Service Incorporated covering guard employees at the Domestic Nuclear Detection Office facility in Washington, D.C. effective from April 30, 2007, until March 31, 2010, with a renewal provision regarding each subsequent April 1. The collective-bargaining agreement addressed topics such as union security and dues check-off, seniority, grievances and arbitration, lay-offs, pay and benefits, and holidays.

Sometime in 2008, the Employer was awarded the contract to provide guard services at the Domestic Nuclear Detection Office facility, which took effect on November 1, 2008. At the time the Employer won the contract, the Employer was not aware that the Intervenor represented guards at the work site.

Within the first few weeks of the Employer's contract, around the time when employees received their first paychecks, the Intervenor faxed the Employer a copy of the collective-bargaining agreement between the Intervenor and USEC, as well as an addendum dated October 25, 2007. The Employer forwarded the collective-bargaining agreement and addendum to the Department of Homeland Security contracting officer so that the government would know that there was a union seeking recognition as the representative of the guards. Sometime in February of 2009, the contracting officer accepted the collective-bargaining agreement and amended the contract between the government and the Employer to incorporate the wages and benefits from the collective-bargaining agreement.

During the hearing, the Intervenor presented a memorandum of acceptance signed by the Intervenor and the Employer. In the memorandum, the Employer agreed to accept the terms and conditions of the agreement entered into by the Intervenor and USEC.[4] The Intervenor signed the memorandum of acceptance sometime in February of 2009, but the record did not establish the date the document was signed by the Employer. However, the signed memorandum was an exhibit at an arbitration hearing between the Intervenor and Employer on March 11, 2010, and thus, must have been in existence prior to that date.

[4] At the hearing, the Employer denied signing the memorandum. However, the Employer failed to object to the authenticity or use of the memorandum at a March 11, 2010, arbitration between the Intervenor and the Employer. Additionally, the Employer testified to having a forensics report regarding the signature on the memorandum, but failed to produce the report or the expert who prepared the report despite ample opportunity to do so.

Article XXXI of the collective-bargaining agreement states that the agreement shall renew itself each successive April 1 unless written notice of an intended change is served by either party at least sixty days, but not more than ninety days prior to the termination date of the contract. Neither the Employer nor the Intervenor provided the other with any such notice within the applicable window prior to the March 31, 2010, contract expiration.

On October 8, 2010, the Petitioner filed a petition to represent guards at the Domestic Nuclear Detection Office.

2. POSITIONS OF THE PARTIES

The Petitioner contends that the contract as a bar to an election ended in 2008 when USEC lost the government contract and the Employer was awarded the contract. In support of its position, the Petitioner argues that there can be no contract bar because the Employer and the Intervenor did not sign an agreement. In the alternative, the Petitioner argues that if the Employer and the Intervenor did sign an agreement, that agreement expired on March 31, 2010, thus ending any contract bar and opening the window for the filing of the representation petition.

The Intervenor contends that the collective-bargaining agreement serves as a contract bar to the Petitioner's petition. In support of its position, the Intervenor argues that the Employer signed a memorandum of acceptance, agreeing to accept the terms and conditions of the Intervenor's previous collective-bargaining agreement with USEC. Thus, the Intervenor argues that the collective-bargaining agreement was in effect, and was automatically renewed on April 1, 2010 when neither the Intervenor nor the Employer provided notice of any intention to change or cancel the agreement within the required window. Therefore, the Intervenor argues the representation petition is barred until the appropriate window opens between sixty and ninety days prior to the expiration of the agreement on March 31, 2011.

3. ANALYSIS AND CONCLUSIONS

The sole issue raised in this proceeding is whether the Employer and the Intervenor are parties to an agreement that would serve to bar an election. For the reasons that follow, and after careful consideration of the totality of the record evidence and the legal positions set forth at the hearing, I find that the Intervenor has established that a contract exists barring further processing of the representation petition.

Under the Board's contract bar doctrine, a collective-bargaining agreement may bar a rival petition (a petition for an election by a rival union, a decertification petition by employees, or a management petition) for the length of the agreement, up to a limit of three years. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). Additionally, the Board has established that an agreement covering a unit of guards between an employer and a labor organization that admits both guards and nonguards to membership will bar a petition for an election. *Stay Security*, 311 NLRB 252 (1993). Thus, an agreement between the Intervenor and the Employer may serve to bar an election. The burden of proving that a contract serves as a bar to an election is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

In situations involving the takeover of a predecessor's operations by a new entity, where the predecessor recognized a union and maintained a contract covering a unit of employees, the new entity is not bound to assume the existing contract, and thus the contract is removed as a bar from any petition that is filed. See *General Extrusion Co., Inc.*, 121 NLRB 1165, 1168 (1958). However, the contract may bar an election if the new entity assumes the contract, and such assumption is express and in writing. See, e.g., *Trans-American Video, Inc.*, 198 NLRB 1247 (1972); *M.V. Dominator*, 162 NLRB 1514, 1516 (1967). The Employer assumed the

predecessor's collective-bargaining agreement by signing the memorandum of acceptance. The memorandum explicitly accepted the terms and conditions of the predecessor agreement.

While the memorandum did not contain a date of execution, it is well settled that the absence of an execution date in a contract does not remove the contract as a bar if it is established that the contract was, in fact, signed before a petition has been filed. *Cooper Tank and Welding Corp.*, 328 NLRB 759 (1999). The record establishes that the Intervenor's representative signed the memorandum in February of 2009, but does not establish the date the Employer's representative signed the memorandum. However, the memorandum was relied upon during an arbitration hearing between the Intervenor and the Employer on March 11, 2010, in order to establish the existence of an agreement between the parties and the authority of the arbitrator. The Employer admitted that the memorandum was relied upon by the arbitrator, that the Employer was able to inspect the memorandum at the arbitration hearing, and that the Employer did not raise any issues as to the authenticity of the memorandum until after the arbitration decision was issued. Thus, the signed memorandum was in existence at least prior to March 11, 2010, which was nearly seven months prior to the filing of the representation petition in question.

In order to bar rival petitions, a contract must contain substantial terms and conditions of employment, including an effective date and an expiration date. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958). The length of the contract term must be ascertainable on the face of the contract. *South Mountain Healthcare & Rehabilitation Center*, 344 NLRB 375 (2005); *Cind-R-Lite Co.*, 239 NLRB 1255, 1256 (1979). The collective-bargaining agreement contains substantial terms and conditions of employment and a definite date of duration.

The collective-bargaining agreement was set to expire on March 31, 2010. However, the agreement contained an automatic renewal provision such that the agreement would be renewed each subsequent April 1 unless written notice of an intended change was served by either party between sixty and ninety days prior to the March 31 expiration. Neither party provided any such notice during the sixty to ninety days prior to March 31, 2010. Thus, the agreement was automatically renewed on April 1, 2010, with an expiration date of March 31, 2011. The Board has long held that an automatically renewed agreement bars an election petition filed during the renewal period. *ALJUD Licensed Home Care Services*, 345 NLRB 1089 (2005). Any rival petition must be filed from 60 to 90 days prior to the end of the contract.[5] *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001-02 (1958). Thus, the October 8, 2010, petition was filed outside this 60 to 90 day window prior to the March 31, 2011, contract expiration.

The memorandum of acceptance between the Intervenor and Employer adopted the predecessor's collective-bargaining agreement. That agreement was automatically renewed on April 1, 2010, and will expire on March 31, 2010. A timely petition by a rival union could be filed as early as January 1, 2011 and as late as January 30, 2011. Because the Petitioner filed its petition on October 8, 2010, before the applicable window period, I find the contract is a bar to an election.

ORDER

The petition is dismissed.

[5] In health care cases, the petition must be filed not more than 120 days or less than 90 days before expiration. *Trinity Lutheran Hospital*, 218 NRLB 199 (1975).

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **November 22, 2010**, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[6] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-

[6] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

/s/ Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street
Baltimore, MD 21202

Dated: November 8, 2010